Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM 1997

ABRAHAM PAUL KOROTKI,

Petitioner,

v.

ATTORNEY SERVICES CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fair Credit Reporting Act, may litigants obtain consumer credit reports without the consumer's permission in all claims "involving" a consumer, where there is no actual need for such sensitive financial information and where no claim has been asserted against the consumer himself?

Under the Fair Credit Reporting Act, does the adversarial objective of serving consumers with legal papers constitute a "permissible purpose" for obtaining full consumer credit reports where such reports are not needed to accomplish this task and the time for service has already expired?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the Court of Appeals were Abraham Paul Korotki, Attorney Services Corporation, Daniel V. Schmitt and Thomas, Ronald & Cooper. Amici curiae below included the United States Public Interest Research Group and the Bankcard Holders of America, both of whom fully endorse Petitioner's position.

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Appendix A -- Opinion of the United States Court of Appeals for the Fourth Circuit Filed December 5, 1997 . . . . . A-1

Appendix B -- Opinion of the United States District Court for the District of Maryland Filed June 12, 1996 . . . . . A-7

Petitioner Abraham Paul Korotki ("Korotki"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Korotki v. Attorney Services Corporation* (No. 96-1877) is not reported, but can be found at 1997 U.S. App. LEXIS (4th Cir. 1997) (App. A). The opinion of the District Court is reported at *Korotki v. Attorney Services Corporation*, 931 F. Supp. 1269 (D. Md. 1996) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on December 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1681a(d):

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility

> for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title.
>
> * * *

15 U.S.C. § 1681b provides, in relevant part, that "A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

> * * *
>
> (3) To a person which it has reason to believe--
>
> (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
>
> (B) intends to use the information for employment purposes; or
>
> (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
>
> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

STATEMENT OF THE CASE

The Needless Intrusion:

On October 25, 1993, Attorney Services Corporation ("ASC") obtained a copy of Korotki's consumer credit report from Equifax Credit Information Services ("Equifax"). J.A. 113. Although this process server admitted that it lacked Korotki's permission to obtain this information, and did not need the personal financial and credit information contained in this report, it claimed to have acted at the request of an attorney who hired ASC to serve certain legal papers upon this consumer. J.A. 217. Conceding that he had no authorization from Korotki, this attorney, Daniel V. Schmitt ("Schmitt") of the law firm of Thomas, Ronald & Cooper ("TRC"), also indicated that he had no need for this information and, at one point, even denied requesting this report. J.A. 151; 988.

By ASC's own admission, this was not the first time that this process server obtained information on the personal finances of individuals without their knowledge or consent. Although ASC was not even authorized to obtain credit reports in its capacity as a process server, J.A. 110, ASC openly sold consumer credit reports for two years prior to the credit inquiry at issue. J.A. 102; 105; 124. Rather than requiring a permissible purpose for such information, ASC merely required that its customers pay a $10.00 fee for each credit report ordered. *Id.*; J.A. 125; 129. In fact, ASC routinely provided such reports to Schmitt and TRC before it inquired into Korotki's finances. J.A. 146; 148.

Lacking any need for such sensitive information, ASC claimed that it used Korotki's credit report in connection with efforts to serve him with legal papers. Specifically, ASC

contended that this report was somehow needed to find an address on which to serve him with a notice by one of Schmitt's construction clients of an intention to file a mechanic's lien on property owned by Korotki's company, APK Development. J.A. 49-50.

Contrary to this assertion, the undisputed facts confirmed that there was never any need to serve such papers on Korotki. Although Schmitt initially wanted ASC to post this notice at APK Development's commercial property, ASC failed to follow his instructions and erroneously posted Korotki's personal residence. J.A. 106-07; 130. By the time ASC's blunder had been called to Schmitt's attention on October 8, 1993, the 90-day limitations period for posting or serving a mechanic's lien notice had already expired under Maryland law. J.A. 150; *see also* Md. Real Prop. Code Ann. § 9-104.

Concerned that his client would sue him upon discovering this error, J.A. 731, Schmitt admits that he still ordered ASC to serve Korotki. While such belated service attempts were unnecessary, "ineffective and improper," J.A. 154-55, ASC nonetheless inquired into Korotki's credit history more than two weeks after limitations expired. J.A. 125A.

Although ASC claims to have obtained Korotki's credit report for the mysterious purpose of finding Korotki, Korotki was not lost. ASC already had *four* valid addresses on which to serve this notice, J.A. 151-52, and did not need more. Moreover, despite ASC's practice of obtaining such addresses through three other types of Equifax reports which do not contain such confidential credit information, ASC never ran anything but a full credit report on this consumer. J.A. 126-27; 184; 732-734. In fact, when asked whether ASC had considered running an Equifax "finder's report" to obtain an

additional address for Korotki, ASC's vice president admitted that he merely "thought about it for a second" before rejecting this non-intrusive alternative. J.A. 108.

Beyond ASC's ability to obtain Equifax reports which could provide addresses without information on personal finances, ASC failed to use many other methods of locating individuals. J.A. 116-119. Although ASC could have waited at Korotki's residence or business to accomplish service, ASC did not even attempt this method before inquiring into his credit history. J.A. 118; 121-22. Because ASC "thought the costs would have been prohibitive" to perform a "stake-out," ASC simply felt that it would be quicker and easier to run Korotki's full credit report. *Id.*

After abandoning efforts to serve Korotki, Respondents admitted that they had absolutely no need for this information. When asked whether ASC had any "need for any information pertaining to Mr. Korotki's credit history," ASC's president admitted that he was "not interested whatsoever in credit history." J.A. 133. Schmitt also testified that he had no need for Korotki's credit report or credit history. J.A. 151. Nor did Schmitt ever instruct ASC to undertake any collection efforts which would require credit information. J.A. 110; 115-115A. At his deposition, ASC's vice president readily admitted that he was "not collecting money on indebtedness or working on the collection end of the business in connection with Abraham Korotki." J.A. 115-115A.

Although this credit report "was of no value" to ASC, J.A. 134, and ASC had no reason to believe that Schmitt needed this information, ASC further disseminated Korotki's credit history and financial status by faxing this report to Schmitt at his law firm. J.A. 110-12. While ASC claims that it sent the report

to Schmitt "just to show that [it] had been working on his case," J.A. 112, it never made any effort to redact or otherwise obscure any of the sensitive credit information contained on that document. *Id.*

Rather than asserting claims against this consumer, the underlying claim involved a construction contract dispute between Schmitt's client and APK Development. In this claim, Angelozzi Brothers, Inc. ("Angelozzi") contended that APK Development owed this contractor $6,000.00 for compaction of soil underneath of a roadway located on APK Development's property. J.A. 713-14. Yet, contrary to this contention, Angelozzi was already paid "in full" to perform this compaction through a contract with Baltimore County, Maryland. J.A. 1003. Furthermore, as Angelozzi's own expert would admit in later litigation, this contractor failed to perform the needed compaction, causing the underlying roadway to fail. J.A. 166.

Recognizing that he had no claim against Korotki himself, and that the opportunity to obtain a mechanic's lien had long expired, Schmitt ultimately abandoned efforts to serve Korotki and instead served APK Development's resident agent with a breach of contract action in state court. J.A. 713-14. In fact, Schmitt admitted that he never sued Korotki personally because his "client's contract was with APK Development Corp. and no one else." J.A. 578. Thus, neither Schmitt nor Angelozzi ever asserted any claim against this consumer and Angelozzi never established any collectible debt which this consumer owed to this contractor. Outraged by this needless intrusion into his personal finances, Korotki sued ASC, TRC and Schmitt (collectively, "Respondents") for violating restrictions on access to consumer credit reports codified in the Fair Credit Reporting Act ("FCRA").

Opening the Door to Consumer Credit Information: The Opinions Below

On cross motions for summary judgment, Respondents sought to avoid liability under the FCRA while Korotki tried to establish their liability for this needless intrusion. Despite Respondents' repeated and uncontradicted admissions that they had no need for Korotki's consumer credit information, the District Court ruled against him.

Although the FCRA required that Respondents have permissible purposes before obtaining consumer credit reports, 15 U.S.C. § 1681b(3), the District Court reversed this burden by requiring that Korotki produce affirmative evidence of illegitimate misuse of this report following its procurement. J.A. 1347. Admitting that it was "not sure that is right," J.A. 305, and claiming that "there is little law on this," J.A. 332, the District Court ignored the law contained in the FCRA itself and disregarded the opinions of every circuit court to consider this issue. Contrary to language requiring a "legitimate business need" for such consumer credit information, the District Court held a hearing to abruptly express the view that Respondents were permitted to obtain this report even if the action was "useless." J.A. 279.

In a lengthy published opinion, the District Court reluctantly acknowledged that Respondents may not have needed the information contained within Korotki's credit report, but nonetheless absolved them of liability for obtaining it. A-7-31. While correctly observing that these "users" of consumer credit information were required to comply with the dictates of the FCRA, A-19, the District Court lowered these requirements by requiring an affirmative showing of "bad faith" on the part of Schmitt and by broadly interpreting the provisions of the FCRA

itself. A-7-31.

Straining to overcome the FCRA's restrictions, the District Court found a legitimate business need despite the undisputed testimony of all Respondents that they had absolutely no need for this information. *See id.* Ultimately recognizing that no contractual claims were ever made against this consumer, the District Court broadly held that there is a permissible purpose for obtaining consumer credit reports whenever anyone asserts monetary claims "involving" a consumer. A-24-25.

In affirming this decision, the Court of Appeals departed from the law of other circuits to adopt the District Court's presumption of a legitimate business need. Reversing the burdens established by Congress in enacting the FCRA, and ignoring the plain language of the statute, the Court of Appeals actually required the consumer to prove an "*im*permissible purpose" and to show some type of affirmative misuse. A-5.

Finding that Korotki "has made no showing that the report was obtained for an impermissible purpose," A-5, the Court of Appeals ignored Respondents' own admissions and assumed the presence of a "legitimate business need" for this information without ever articulating it. *Id.* By establishing such a presumption where Respondents themselves have confessed to no such need, the Court of Appeals adopted a broad and unprecedented interpretation of the FCRA which lowers the threshold for obtaining consumer credit reports and declares open season on consumer credit information.

Under the Court of Appeals' decision, whenever claims are asserted which merely "involve" a consumer, claimants have an automatic right to obtain the consumer's credit report -- even

where, as here, no claim was ever asserted against the consumer himself and no genuine need existed! *See* A-5. Without specifying any actual need for this information, the Court of Appeals simply observed Korotki's role in a transaction involving his company, ignored the fact that no claim was ever made against Korotki personally, and permitted the intrusion into his personal finances. *Id.* By adopting this broad holding, the Court of Appeals has effectively repealed fundamental protections embodied in the FCRA, subjecting all consumers under its jurisdiction to the unwarranted intrusions of their adversaries.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD NOT PERMIT THE COURT OF APPEALS TO REMOVE PROTECTIONS FOR CONSUMER PRIVACY WHICH CONGRESS AND A MAJORITY OF CIRCUITS HAVE UPHELD

Absent any evidence of an actual need for consumer credit information, the Court of Appeals' blind presumption of a legitimate business need for Korotki's credit report disregards the opinions of every circuit addressing this issue and ignores the plain language of the FCRA itself. By permitting unfettered access to consumer credit reports whenever unsubstantiated claims merely "involve" a consumer, the Court of Appeals has effectively repealed the FCRA's restriction of access to sensitive financial information on all consumers within its jurisdiction. Unlike the citizens of other states, consumers in Maryland, Virginia, West Virginia, North Carolina and South Carolina no longer enjoy the same protections for privacy which Congress intended to provide throughout the nation.

Contrary to the Court of Appeals' opinion, no other circuit interpreting the FCRA has ever imposed a burden upon consumers to prove a bad faith misuse of their credit reports. Indeed, without a "permissible purpose" for this information, the FCRA prohibits users from retrieving such reports in the first place, regardless of their activities thereafter. *See* 15 U.S.C. § 1681b(3).[1]

Under the FCRA, users may only establish a permissible purpose for obtaining credit reports if they:

(A) intend to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intend to use the information for employment purposes; or

(C) intend to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intend to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by

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[1] If the Court of Appeals' new burden on consumers were left undisturbed, consumers would rarely benefit from the protections of the FCRA. Since evidence of an affirmative misuse or malevolent purpose would be exclusively within the province of the users themselves, it would be extremely difficult for any plaintiff to maintain an action under the FCRA if such evidence were required. Thus, such an impossible burden of production would take the teeth out of this statutory scheme.

law to consider an applicant's financial responsibility or status; or

(E) otherwise have a legitimate business need for the information in connection with a business transaction involving the consumer.

15 U.S.C. § 1681b(3). Thus, rather than imposing a substantive burden on consumers to prove an impermissible purpose, those requesting credit reports must limit their use to the permissible purposes outlined in the FCRA or face substantial liability. *Mone v. Dranow*, 945 F.2d 306, 307-08 (9th Cir. 1991); *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978).

Although the Court of Appeals failed to analyze these provisions and ignored the opinions of all other circuits, none of the statutory provisions permitting persons to obtain consumer credit reports apply to the invasion at issue. While the Court of Appeals adopted a broad reading of these provisions by presuming a "legitimate business need" in all claims involving consumers, such expansive constructions have already been considered and rejected by several prominent courts throughout the country. *See, e.g., Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991); *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986); *Hovater v. Equifax, Inc.*, 823 F.2d 413, 419 (11th Cir. 1987); *Russell v. Shelter Financial Services*, 604 F. Supp. 201, 202-03 (W.D. Mo. 1984); *Boothe v. TRW Credit Data*, 557 F. Supp. 66, 70 (S.D.N.Y. 1982); *Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 830-31 (N.D. Ga. 1979).

As the Ninth Circuit emphasized in reviewing the legislative history underlying the FCRA, "Congress intended the FCRA to authorize a credit reporting agency to issue a

consumer report to determine 'an individual's eligibility for credit, insurance or employment.'" *Mone*, 945 F.2d at 308, *quoting* 116 Cong. Rec. 36,572 (1970)(Statement of Rep. Sullivan). To paraphrase the Ninth Circuit, Respondents' purported need to find an alternate address on which to serve legal papers upon Korotki "is plainly a purpose unrelated to 'an individual's eligibility for credit, insurance or employment.' A contrary construction of the statute would frustrate Congress' intent." *Id.*

As the Federal Trade Commission has opined, "[t]he possibility that a party may be involved in litigation involving a consumer does not provide a permissible purpose for that party to receive a consumer report on such consumer ... ." 16 CFR Pt. 600, App. at 385. In fact, earlier drafts of the FCRA confirm that this legislation was not designed to provide information to serve the litigious objective of asserting monetary claims against consumers. While authorizing the use of these reports by those wishing to convey such benefits on consumers as credit, insurance, employment or government licenses, House Resolution 16340 expressly prohibited the antagonistic purposes for which Respondents obtained Korotki's credit report. *See* H.R. 16340, *reprinted in Hearings before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency of the U.S. House of Representatives*, 91st Cong., 2d Sess. at 6 (1970).

According to § 34 of this bill, permissible purposes for credit reports do *not* include "furnishing information to an attorney for use in a legal matter unless the individual on whom the information is furnished is a client of that attorney and agrees in writing to the furnishing of the report." *Id.* § 34(c). While Congress selected the ultimate language of the FCRA from the Senate version, *see* S.B. 823, nothing in the legislative

history shows any Congressional intent to broaden the purposes for credit reports to meet the needs of those making claims *against* consumers. As its main sponsor observed on the floor of Congress, "[t]he new title attempts to balance the need by those who *extend* credit, insurance or employment to know the facts necessary to make a sound decision," with the needs and rights of consumers. 116 Cong. Rec. 36,572 (1970) (emphasis added). In short, Congress intended to provide this information to those seeking to confer benefits upon consumers rather than those asserting claims against them.

Following this Congressional intent, courts have uniformly read the "legitimate business need" language of § 1681b(3)(E) as limiting the use of credit reports to those determining consumers' eligibility for such benefits as credit, employment, insurance or licensure. *Mone*, 945 F.2d at 308. As the Third Circuit observed in *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144 (3d Cir. 1986), well-established canons of statutory construction dictate that this language be narrowly interpreted in light of the specific language which precedes it:

> A broad interpretation of the "business transaction" language of § 1681b(3)(E) would render the specificity of §§ 1681a(d) and b(3) meaningless. We believe that any § 1681b(3)(E) business transaction must relate to one of the other specifically enumerated transactions in §§ 1681a(d) and b(3), *i.e.*, credit, insurance eligibility, employment, or licensing. This is to say that a consumer relationship must exist between the party requesting the report and the subject of the report.

Id. at 1149. Far from a unique interpretation, the Eleventh

Circuit observed in a case cited with approval by ASC that "the courts have recognized the preeminence of § 1681a and conformed the breadth of § 1681b to its bounds." *Hovater*, 823 F.2d at 419 (11th Cir. 1987). Indeed, if a "catch-all reading of § 1681b(3)(E) is derived, the specifics of the preceding sections and subsections are rendered meaningless." *Cochran*, 472 F. Supp. at 830-31; *Houghton*, 795 F.2d at 1149. "This view of section 1681(b)(3)(E) is consistent with that of the majority of courts that have addressed the issue," including the Third, Seventh, Ninth and Eleventh Circuits. *Mone*, 945 F.2d at 308; *Hovater*, 823 F.2d at 419 ("Most district courts have reached similar conclusions.").

By splitting with these circuits and adopting a broad and unprecedented interpretation of "legitimate business need," the Court of Appeals rendered the entire Act meaningless for millions of consumers within its jurisdiction. Here, Respondents' activities did not, in any respect, relate to credit, insurance eligibility, employment, or licensing. Respondents have repeatedly sworn that they had no need whatsoever for the financial or credit information contained on the credit report, J.A. 133; 151, and confirmed that this report "was of no value." Yet, in total disregard for consumer privacy, ASC nonetheless disseminated Korotki's personal finances by faxing this entire report to Schmitt "just to show that [it] had been working on his case." J.A. 110-12.

In ignoring Respondents' own admissions, the Court of Appeals has concocted a virtually irrebuttable presumption of permissible purposes where none, in fact, exist. Even if one were to expand the FCRA to allow for the use of credit reports in efforts to serve consumers with legal papers, the time for serving Korotki had long expired by the date of the credit inquiry at issue, J.A. 150, and, in any event, there was no need

to obtain his full credit report to locate this individual. Respondents failed to use four valid addresses for serving Korotki and summarily rejected a host of non-intrusive methods for obtaining more. J.A. 118, 121-22, 131-32, 151-52.

Notwithstanding the fact that Respondents' purported "business need" falls outside of the permissible purpose provision, the availability of many other non-intrusive reports and methods of obtaining addresses nullifies any claim that Respondents had any legitimate *need* for Korotki's full credit report. In failing to address these alternatives, the Court of Appeals ignored the fact that no *legitimate* need can exist where Respondents may obtain the desired information without a consumer credit report at all.

Beyond the Court of Appeals' disingenuous creation of an unspecified "business need," its expansive holding subjects consumers to credit inquiries whenever consumers are merely "involved" in the underlying transaction. Such abuses are even permitted where, as here, no claim has ever been asserted against the consumer, no personal liability applies, and no judgment has ever been obtained.

While the Court of Appeals emphasized Korotki's role in negotiations on behalf of his corporation, these communications never gave rise to any personal liability on the part of this consumer. *See A. S. Abel Co. v. Skeen*, 265 Md. 53, 288 A.2d 596 (1972) (agent for fully disclosed principal does not incur personal liability). Recognizing that his "client's contract was with APK Development Corp. and no one else," J.A. 578, Schmitt filed suit on behalf of Angelozzi against APK Development -- ***not*** against Korotki himself. J.A. 713-14.

Lacking any personal liability, Respondents lacked any

need for information on the personal finances of this consumer. Nonetheless, the Court of Appeals cited inapplicable language in the FCRA to suggest that his credit report was somehow needed "in connection with a credit transaction involving the consumer on whom the information is to be furnished ***and*** involving the extension of credit to, or review or collection of an account of, the consumer." 15 U.S.C. § 1681b(3)(A) (emphasis added).[2]

Contrary to the Court of Appeals' cursory review of this language and the facts of this case, neither Respondents nor Angelozzi ever engaged in a credit transaction with Korotki and they were not, in any respect, attempting to collect upon an account of this consumer. *See Mone*, 945 F.2d at 308. Schmitt never instructed ASC to undertake collection of any debt owed by Korotki and ASC was not collecting money on indebtedness or working on the collection end of the business in connection with this consumer. J.A. 110; 115-115A. Having failed to cite any evidence remotely suggesting personal liability on the part of the consumer, the Court of Appeals cannot legitimately claim that they were engaged in the "collection of an account of ... the consumer." *Grenier v. Equifax Credit Information Services*, 892 F. Supp. 57, 59 (D. Conn. 1995).

Unfortunately for Korotki and other consumers residing in the Fourth Circuit, the Court of Appeals stubbornly insisted

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[2] Without specifying its precise construction of this important language, the opinion below did not appear to recognize that the FCRA only authorizes a credit inquiry under this provision if needed in connection with (1) a credit transaction involving the consumer on whom the information is to be furnished; ***and*** (2) the extension of credit to, or review or collection of an account of, the consumer. 15 U.S.C. § 1681b(3)(A). Although both of these elements are required, neither are present in this case.

that this information was somehow needed for unspecified collection purposes. While the District Court was content to speculate on theoretical needs for such information, the FCRA requires that these needs be *legitimate* and, as previously discussed, all other circuits and the sound majority of courts have rejected expansive interpretations of this language. 15 U.S.C. § 1681b(3)(E); *see, e.g., Hovater*, 823 F.2d at 419; *Mone*, 945 F.2d at 308. Because the Court of Appeals departed from these circuits to remove the protections of the FCRA, this Court must now intervene to restore the privacy of millions of consumers.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ELIMINATED FUNDAMENTAL PROTECTIONS FOR CONSUMER PRIVACY WHICH CONGRESS INTENDED TO PROVIDE IN PASSING THE FCRA

As this Court observed in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978), in this type of commercial context, there is a strong governmental interest "in protecting consumers and regulating commercial transactions." *See also Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 795 (1985)(Brennan, J., dissenting). By ruling in Defendants' favor, the Court of Appeals adopted a dangerous holding which would severely undermine Congressional protection for consumers and thwart the intent of Congress. In restricting access to consumer credit reports, Congress expressly found "a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a *respect for the consumer's right to privacy*." 15 U.S.C. § 1681(a) (emphasis added). Indeed, "one of the

major purposes of the FCRA is to protect the privacy of individual citizens and of records maintained by credit agencies." *In re Grand Jury Subpoena to Credit Bureau of Greater Harrisburg*, 594 F. Supp. 229, 233 (W.D. Pa. 1984); *Rice v. Montgomery Ward & Co.*, 450 F. Supp. 668, 672 (M.D.N.C. 1978)("the consumer's right to privacy" is "one of the policies underlying the FCRA").

If this Court refrained from reviewing the Court of Appeals' holding that credit reports may be freely obtained by anyone asserting a monetary claim "involving" a consumer, J.A. 1342, it would destroy the consumer's right to privacy and frustrate Congressional goals. In particular, the opinion below invites abuses by those who will undoubtedly assert dubious or frivolous claims as a pretext for intruding upon personal financial data. In fact, this opinion would be cited as prime authority for those wishing to extort undeserved payments from consumers who fear exposure of financial and credit information which they regard as private.

As this Court is undoubtedly aware, anyone can assert monetary claims against consumers like Korotki regardless of merit.[3] Yet, as federal courts have long recognized, even monetary claims asserted in litigation do not entitle claimants to pry into a consumer's assets and financial status. *See, e.g.*,

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[3] Simply put, there was never any claim against the consumer himself and the claim against his corporation was highly contested. Far from resulting in an actual judgment against Korotki, the underlying dispute between APK Development and Angelozzi was vigorously contested, with the latter's own expert verifying that this contractor failed to perform the necessary construction services. J.A. 166. Thus, Respondents could hardly base their intrusion into the financial affairs of the consumer on anything approaching an established debt for a sum certain.

Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977); *Ranney-Brown Distributors, Inc. v. E.T. Barwick Industries*, 75 F.R.D. 3 (S.D. Ohio 1977); *Bogosian v. Gulf Oil Corp.*, 337 F. Supp. 1228 (E.D. Pa. 1971). Although litigants asserting monetary claims often seek to discover the assets of defendant consumers, "general discovery of a defendant's assets involves an invasion of privacy of such a magnitude that courts typically have not allowed it." Friedenthal, Kane & Miller, Civil Procedure 383 (West 2d ed. 1993)(footnote omitted).

Beyond formal discovery, courts have refused to permit such invasions through the use of consumer credit reports as well. In *Mone*, 945 F.2d 306, the defendant sought to recover funds from a consumer and obtained his credit report to determine the consumer's ability to satisfy any judgment later obtained. Although the defendant moved for summary judgment on the ground that he had a "legitimate business need" for this information, the Ninth Circuit flatly rejected this argument. *Id.* at 308. According to the *Mone* court, the mere presence of litigation between parties does not give rise to a legitimate business need under the FCRA. *Id.* Thus, in denying the defendant's summary judgment motion, the Ninth Circuit emphasized that a "contrary construction of the statute would frustrate Congress' intent." *Id.*

Unfortunately, the Court of Appeals adopted a construction of the statute that would frustrate both Congress and consumers. Armed with the opinion below, those asserting monetary claims against consumers need not establish any legitimate need for credit information. Nor do they need to face the roadblocks of discovery so long imposed by federal and state courts throughout the country. Instead, they only need a $10.00 bill -- the price of a full credit report from ASC. J.A. 142.

While such credit inquiries may be justified where monetary claims have attained the legitimacy of enforceable judgments against consumers themselves, *see, e.g., Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260 (S.D.N.Y. 1994), such intrusions into personal credit and financial information should not be based upon the unilateral allegations of one party.[4] This is particularly true where, as here, these allegations amount to nothing more than fraudulent and frivolous claims by a contractor who has already been paid for work *never* performed! J.A. 1184. Such claims, thoroughly lacking in credibility and vigorously contested in litigation, should not serve as a pretext for invading an individual's privacy. To rule otherwise, this Court would elevate the unproven and baseless allegations of individual claimants over the privacy of innocent consumers.

When one expands these abuses to the multitude of business transactions in which consumers were merely "involved" in the communications chain, but bear no personal liability, consumer privacy is virtually eliminated. Considering the undisputed fact that the claimant in this case has never asserted and cannot legitimately assert any claim for monetary relief against the consumer, Respondents' needless intrusion into Korotki's personal credit status amounts to a dangerous distortion of the FCRA which this Court should address and rectify.

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[4] Amazingly, the Court of Appeals totally misread the *Baker* decision by citing it for the dangerous proposition that Angelozzi need not "wait until his disputed claim had been reduced to judgment before obtaining a consumer report." A-6. Contrary to this misreading, the *Baker* court only approved of a consumer credit inquiry where an actual judgment had already been entered against the consumer himself. *Baker*, 850 F. Supp. 260. By contrast, in the case at bar, Angelozzi did not even have a *claim* against the consumer, much less the validity and reliability of an enforceable judgment.

CONCLUSION

Although this Court has yet to interpret the scope of the Fair Credit Reporting Act, the Court of Appeals' decision amounts to an urgent call for this Court's attention to an issue of monumental importance to millions of consumers. Departing from the law in other circuits, the Court of Appeals has subjected consumers within its jurisdiction to the danger of abusive and unjustified credit inquiries at the hands of their adversaries.

In an age when consumer privacy is subject to increasing intrusions, this Court should not remain silent as fundamental protections for consumer privacy are dismantled. Because consumers should not lose these protections by the mere misfortune of living in the Fourth Circuit, Petitioner and the amici curiae below, the U.S. Public Interest Research Group and the Bankcard Holders of America, urge that this Court issue a writ of certiorari to clarify the scope of these vital safeguards. Due to the Court of Appeals' significant departure from the Federal Trade Commission's interpretation of the FCRA, Petitioner also urges this Court to order the Solicitor General to present the views of that agency on these critical questions.

Respectfully submitted

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Attorney for Petitioner

APPENDIX

APPENDIX A

A-1

ABRAHAM PAUL KOROTKI, Plaintiff-Appellant, v. THOMAS, RONALD & COOPER, P.A., a Maryland Professional Association, Defendant-Appellee, ATTORNEY SERVICES CORPORATION, Defendant & Third-Party Plaintiff-Appellee, v. DANIEL V. SCHMITT, Third Party Defendant-Appellee. US PUBLIC INTEREST; BANKCARD HOLDERS OF AMERICA, Amici Curiae.

No. 96-1877

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, Senior District Judge. (CA-94-1212-K).

December 5, 1997, Decided

Before WILKINS, Circuit Judge, PHILLIPS, Senior Circuit Judge, and THORNBURG, United States District Court Judge for the Western District of North Carolina, sitting by designation.

ARGUED: Irwin Raphael Kramer, THE LAW OFFICES OF IRWIN R. KRAMER, Owings Mills, Maryland, for Appellant. Terri Lynn Goldberg, ECCLESTON & WOLF, Baltimore, Maryland; Benjamin Lipsitz, Baltimore, Maryland, for Appellees. ON BRIEF: S. Todd Willson, ECCLESTON & WOLF, Baltimore, Maryland; Joel C. Richmond, OFFICE OF JOEL C. RICHMOND, Baltimore, Maryland, for Appellees. Ronald B. Katz, Owings Mills, Maryland, for Amicus Curiae.

PER CURIAM:

The appellant, Abraham Korotki, appeals from the district court's grant of summary judgment dismissing his action. For the reasons hereafter set forth, we affirm.

Summary judgment is appropriate if there is no genuine issue of material fact and judgment for the moving party is warranted as a matter of law. Fed. R. Civ. P. 56(c). We review the record de novo and in doing so view the evidence in the light most favorable to the party opposing summary judgment. *Sony Corp. of America v. Bank One, West Virginia, Huntington, N.A.*, 85 F.3d 131, 135 (4th Cir. 1996). From this review, we must determine whether a genuine issue exists from which a reasonable jury considering the evidence could return a verdict for plaintiff. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)), cert. denied, 513 U.S. 813, 814 (1994). A mere scintilla of evidence is not sufficient to defeat summary judgment.

Korotki is in the business of real estate development and construction. In October 1991, he entered into a public works agreement with Baltimore County for construction of public improvements at Old Court Village. Korotki requested Angelozzi Brothers, Inc. (Angelozzi) to provide full trench compaction at a cost estimate of $12,000 and agreed to pay this amount for compaction or, in the alternative, to give Angelozzi a car in lieu of cash. Pursuant to this oral contract, Angelozzi completed the trench compaction and billed Korotki for $6,000, one-half the original cost estimate. After repeated demands for payment which were refused by Korotki, Angelozzi sought a mechanics lien against the

development property and retained the services of attorneys Thomas, Ronald & Cooper, P.A., and Daniel B. Schmitt, now third-party defendants, to collect the indebtedness. The attorneys then hired defendant Attorney Services Corporation to serve notice of the lien on appellant and his development company. This service was sought on appellant as owner of the real estate on which Old Court Village was located and as the president and only principal of APK Development. Maryland law required service of the notice of intent to lien on the landowner. Md. Real Prop. Code Annot. § 9-104.

From September through December 1993, unsuccessful efforts were made to serve Korotki in a variety of ways from registered mail to personal service to posting of notice on the gate of Korotki's house. All of the efforts having failed, Attorney Services Corporation obtained a copy of Korotki's credit report from Equifax Credit Information Services, a licensed collection agency in the State of Maryland, for the purpose of obtaining a new service address for Korotki. No helpful information was obtained from the report; no further use was made of the report, and a breach of contract action was finally filed in state court for collection of the indebtedness.

Thereafter, Korotki learned that the credit document had been obtained without his permission and filed the action now before this Court. Appellant alleged a violation of the Fair Credit Reporting Act, *15 U.S.C. § 1681,* et seq. (FCRA), and pendant state claims under the Maryland Consumer Credit Reporting Agencies Act (MCCRAA).

This Court addresses the defendants' summary judgment motion under the assumption that the report is a consumer report and, therefore, that the FCRA applies to its use.

> The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. . .
>
> .

15 U.S.C. § 1681a(d) (1988); see also *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273-75 (9th Cir. 1990).

Title 15, United States Code, Section 1681(b) permits a consumer reporting agency to furnish a report without the consumer's authorization:

> (3) to a person which it has reason to believe
>
> > (A) intends to use the information with a credit transaction involving the consumer on whom the information is to be furnished and involving . . . collection of an account of, the consumer; or
> >
> > . . .
> >
> > (E) otherwise has a

> legitimate business need for the information in connection with a business transaction involving the consumer.

While this language might arguably apply only to consumer agencies, we conclude that the wording is equally applicable to a user. Under § 1681(b), a user may only obtain a consumer report for a permissible purpose therein enumerated. *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987) (citing *Hansen v. Morgan*, 582 F.2d 1214, 1216 (9th Cir. 1978)). Appellant has made no showing that the report was obtained for an impermissible purpose. We experience no difficulty under the facts of this case in concluding that seeking to obtain an alternate address at which to serve appellant was "a legitimate business need for the information in connection with a business transaction involving the [appellant]," § 1681(b)(3)(E); and, therefore, a permissible purpose for its use. And, Angelozzi was seeking to collect an account owed by the consumer, § 1681(b)(3)(A), likewise a permissible purpose. Korotki admitted requesting Angelozzi to perform certain compaction services whether or not these services were already included in Angelozzi's contract with the county. He also agreed that if the county was not required to pay for the services, he would tender his car as payment. Obviously, these admitted facts created a business relationship between the parties, and Angelozzi correctly believed this to be true. The terms "legitimate business need" and "in connection with" refer to the needs and objections of the individual to whom the report is furnished, not the needs of the person about whom the report is furnished. *Zeller v. Samia*, 758 F. Supp. 775, 781 (D. Mass 1991). In that context, it was not necessary for Angelozzi to wait until his disputed claim had

been reduced to judgment before obtaining a consumer report. See *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 262-63 (S.D.N.Y. 1994). It is likewise immaterial that a person other than defendant himself received the report for a permissible use. *Id., at 262.*

Appellant also seeks similar relief under the MCCRAA. Inasmuch as the FCRA and the MCCRAA are virtually identical, we conclude, as did the district court, that the defendants violated neither statute. *Cambridge Title Co. v. Transamerica Title Ins. Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992), aff'd, 989 F.2d 491 (4th Cir. 1993).

For the foregoing reasons and the reasons set forth by the court below, the district court's judgment is

AFFIRMED.

APPENDIX B

A-7

ABRAHAM PAUL KOROTKI v. ATTORNEY SERVICES CORPORATION INC., et al.

CIVIL NO. K-94-1212

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

931 F. Supp. 1269

June 12, 1996, Filed

Irwin R. Kramer, Owings Mills, Maryland for plaintiff.

S. Todd Wilson, Terri L. Goldberg, and Eccleston and Wolf, Baltimore, Maryland for defendants Thomas, Ronald & Cooper and Daniel V. Schmitt.

Sheila Brooks-Tahir, Baltimore, Maryland for defendant Attorney Services Corporation.

FRANK A. KAUFMAN, Senior District Judge

Plaintiff alleges that defendants violated the federal Fair Credit Reporting Act (FCRA)[1] and the Maryland Consumer Credit Reporting Agencies Act (CCRAA)[2] when they acquired plaintiff's credit report in order to obtain an additional address at which to serve plaintiff with certain legal

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[1]15. U.S.C. §§ 1681-a-1681t (1982).

[2]Md. Comm. Law Code Ann. § 14-1201 through 14-1218 (1990).

papers. Plaintiff also contends that defendants committed the tort of invasion of privacy. This Court has federal question jurisdiction over plaintiff's FCRA claim. *28 U.S.C. § 1331.* Because plaintiff's remaining claims arise from the same case or controversy as his FCRA claim, this Court has supplemental jurisdiction over those state law claims. *28 U.S.C. § 1367.* Pending before this Court are defendants' summary judgment motions and plaintiff's cross motion for summary judgment.

I. Facts and Procedural History

The relevant and material facts are undisputed. Plaintiff Korotki is the President of APK Development Corporation ("APK"), the developer for a property in Baltimore County, Maryland, known as Old Court Village ("OCV").[3] Korotki, either on his own behalf or on behalf of APK, contracted with Baltimore County to have sewer and water mains and roads installed at OCV in 1991.[4] Baltimore County requested and

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[3] Plaintiff's January 5, 1996 Supplemental Memorandum, Ex. L, Aff. of Korotki, P2. Defendant ASC objects to plaintiff's January 5, 1996 filing, stating that it was untimely submitted. ASC's January 19, 1996 supplemental memorandum at 1. Plaintiff's filing was received in this Court on January 5, 1996, the day it was due, and plaintiff's counsel certified that it was hand-delivered to defendants' counsel on that date. While it was apparently not filed with the Clerk's Office of this Court on that date, ASC has shown no possible prejudice resulting therefrom. For that reason, this Court will consider plaintiff's January 5, 1996 filing.

[4] TRC's and Schmitt's January 5, 1996 motion for summary judgment, Ex. 4 at P8.

received bids for the performance of that utility work and awarded the contract to Angelozzi Brothers, Inc. ("Angelozzi"). While Angelozzi was performing the contract, questions arose among Angelozzi, Baltimore County officials and Korotki as to whether the contract required Angelozzi to perform certain compaction services. Korotki told Angelozzi that if the contract did not require Angelozzi to perform those services, Korotki would pay Angelozzi $12,000 to perform them and offered to pay in the form of a 1976 Cadillac Eldorado.[5] Angelozzi apparently later reduced the price to $6,000

Angelozzi submitted an invoice in the amount of $6,000 to Korotki on May 20, 1993.[6] Korotki apparently refused to pay that invoice, claiming that the original contract between Angelozzi and Baltimore County required Angelozzi to perform the compaction services, and that, in any event, Angelozzi had failed appropriately to perform the work.[7] Angelozzi then hired Defendant Thomas, Ronald & Cooper (TRC), a law firm which Angelozzi had used previously, to

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[5] While plaintiff claims that he had no "personal business relationship" with Angelozzi, see plaintiff's January 5, 1996 supplemental memorandum, Exhibit L, Affidavit of Abraham Paul Korotki at P 16, plaintiff admitted at his deposition, and has not denied at any time, that he made the agreement described. Defendants Schmitt and TRC's January 5, 1996 motion for summary judgment, Exhibit 1, Dep. of Korotki at 74.

[6] Defendants Schmitt and TRC's January 5, 1996 motion for summary judgment at 3, PJ.

[7] Plaintiff's January 5, 1996 supplemental memorandum at 5.

collect the disputed $6,000 from Korotki.[8] Defendant Schmitt, a lawyer with the aforementioned firm, attempted to establish a mechanic's lien against the OCV property and enlisted the aid of Attorney Services Corporation (ASC) to post that property with notice of the lien.

Inadvertently, ASC posted the notice at Korotki's personal residence, instead of on the OCV property. Before Schmitt became aware of ASC's mistake, the 90-day notice period for establishing the mechanic's lien had expired.[9] When Schmitt learned of the mistake on October 8, 1993, Schmitt instructed ASC to serve Korotki personally with papers regarding the mechanic's lien.[10] Despite repeated attempts, ASC was unable to serve Korotki at the addresses which ASC had for him.[11] At that point, ASC contends, Schmitt directed ASC to obtain an alternate address for Korotki from recent credit and DMV reports.[12] ASC, without any specific authorization

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[8] ASC's January 5, 1996 motion for summary judgment at 3.

[9] Plaintiff's November 22, 1995 cross motion for partial summary judgment, Exhibit G, deposition of Schmitt at 31, lines 7-9.

[10] ASC's December 15, 1995 Reply, Exhibit 2, Deposition of Rosen at 79-80.

[11] See Defendant ASC's January 5, 1996 filing, Aff. of Rosen.

[12] Schmitt may be disputing that contention since he states that he is not sure whether he requested the credit report. Plaintiff's January 5, 1996 supplemental memorandum at 2-3

from Korotki or Schmitt, obtained a credit report from Equifax on October 25, 1995.[13] ASC transmitted a copy of that report to Schmitt. ASC says it so did in order to show that ASC had been working on the case. ASC then destroyed its copy.[14] ASC admits it had no use for the credit information in that report, but was only interested in obtaining an address at which to serve Korotki.[15] Likewise, Schmitt made no use of the report.[16] Moreover, Korotki does not allege that ASC, Schmitt or TRC used the credit report for any purpose.

After learning that ASC had obtained his credit report, Korotki filed the present action against ASC on May 9, 1994, alleging wilful and negligent violation of the FCRA, wilful and negligent violation of the Maryland Consumer Credit Reporting Agencies Act (CCRAA), and invasion of privacy. ASC, in turn, sued Schmitt and TRC for indemnification and/or contribution and for negligent misrepresentation. Korotki then amended his complaint to add Schmitt and TRC

& n.3.

[13] Counsel for ACS so informed this Court, on the record, during the December 29, 1996 hearing.

[14] Plaintiff's November 22, 1995 cross motion for summary judgment, Exhibit A, Dep. of Rosen at 86.

[15] Korotki's November 22, 1995 cross motion for partial summary judgment, Exhibit B, Dep. of Sitnick at 97.

[16] TRC's and Schmitt's January 5, 1996 memorandum in support of motion for summary judgment, Exhibit 3, Dep. of Schmitt at 56.

as defendants, alleging the same claims against both Schmitt and TRC as he had previously alleged against ASC. Finally, Schmitt and TRC cross claimed against ASC for contribution and indemnification.

On November 6, 1995, defendant ASC filed a summary judgment motion against plaintiff. Plaintiff simultaneously opposed that motion and filed a cross-motion for partial summary judgment on liability only. This Court held an on-the-record motions hearing in open court on December 29, 1995 to consider those motions. At that time, the Court afforded Defendants TRC and Schmitt the opportunity to file a summary judgment motion against plaintiff, and those defendants thereafter filed that motion on January 5, 1996. At the aforementioned December 29, 1995 hearing, this Court also invited all parties to submit further filings to this Court regarding various issues.[17]

On January 19, 1996, plaintiff filed a motion regarding TRC's and Schmitt's failure to respond to his second request for production of documents. Plaintiff's second request for documents contained four separate requests. Regarding the first two requests, counsel for TRC and Schmitt represented that she had previously provided to counsel for plaintiff all documents responsive to those requests. The second two requests sought certain financial information from TRC and

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[17] In a letter to this Court dated January 5, 1996, plaintiff stated that "this Court's preliminary views on this case may result from what it observed as shortcomings in presentation rather than the merits of the case itself." To the contrary, this Court is of the opinion that all parties in this case have thoroughly and adequately presented their respective positions.

Schmitt. According to counsel for plaintiff, such requests were relevant only to plaintiff's claim for punitive damages. This Court delayed ruling on the second two requests until after deciding the aforementioned pending summary judgment motions. Because this Court will decide those motions in favor of defendants, and determine that there is no liability upon any defendant herein, no damage issue need be reached and plaintiffs' motion regarding discovery as to punitive damages is moot.

In several written and oral communications with counsel, this Court afforded the parties opportunities to make additional filings. The final deadline for these filings was March 24, 1996. Having considered all motions filings, this Court will grant summary judgment in favor of defendants and deny plaintiff's summary judgment motion. The summary judgment motion of defendants TRC and Schmitt will be treated as moot.

II. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Material facts are those facts which the substantive law identifies as "facts that might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute concerning material facts is genuine if "a reasonable jury could return a verdict for the nonmoving party." Id. "A defendant moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that he is entitled to

judgment as a matter of law. . . . Once a defendant makes the necessary showing, the plaintiff must go forward and produce evidentiary facts to support his contention." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958 (4th Cir. 1984). In fact, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). However, the non-movant is entitled to have all reasonable inferences drawn in his favor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

III. Analysis

In deciding the pending motions, this Court must address four issues. First, is the report ASC obtained from Equifax on October 25, 1993 a "consumer report" to which the FCRA applies?[18] Second, if so, what does the FCRA require of

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[18] Counsel for plaintiff noted, in a letter to this Court dated February 29, 1996, that the parties stipulated to the fact that the report at issue in this case was a "consumer report." One or more defendants dispute that contention. See March 4, 1996 letter from counsel for defendants TRC and Schmitt. In any event, a court is generally not bound by parties' stipulations regarding issues of law. *Koch v. U.S. Dept. of Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995), cert. denied, 133 L. Ed. 2d 208, 116 S. Ct. 303 (1995); *In re Lawson Square Inc.*, 816 F.2d 1236, 1240-41 (8th Cir. 1987), *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1477 n.1 (9th Cir. 1986), modified on other grounds, 810 F.2d 1517 (1987); *Saviano v. C.I.R.*, 765 F.2d 643, 645 (7th Cir. 1985). Whether the report at issue is a consumer

defendants herein? Third, have the defendants failed to comply with those requirements? Fourth, are defendants liable to plaintiff on any of plaintiff's state law claims?

A. Consumer Report

15 U.S.C. § 1681a(d) defines a consumer report as

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title.

That definition occasions the need to inquire into the motive of the credit reporting agency, here Equifax, because "if at the time the information was collected, the agency expected it to be used for proper purposes, a transmittal of that information would be a consumer report." *Heath v. Credit Bureau of Sheridan, Inc.*, 618 F.2d 693, 696 (10th Cir. 1980). The record in this litigation indicates that when Equifax provided ASC with the computer software to obtain credit reports such as the October 25, 1993 report regarding Korotki, Equifax

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report is a mixed question of fact and law. *Chandris, Inc. v Latsis*, 132 L. Ed. 2d 314, 115 S. Ct. 2172, 2190 (1995). Therefore, even if the parties stipulated that the report was a consumer report, this Court would not be bound by that stipulation to the extent that it involves an issue of law.

apparently provided ASC a copy of the FCRA.[19] That fact at least raises an inference that when Equifax collected the information, it anticipated that the information would be used, by ASC and/or others, for a proper purpose under the FCRA.[20] Moreover, a review of the three-page report itself suggests that at least some of the information in it was collected for the purpose of determining Korotki's eligibility for credit. The first page appears to refer solely to APK Development. The second two pages, however, appear to contain information regarding Korotki's individual bank accounts, mortgages and credit cards. On this record, this Court cannot say as a matter of law that none of the information in Korotki's report was collected for the purpose of establishing Korotki's eligibility for consumer credit. For that reason, for purposes of deciding defendants' summary judgment motion, it will be assumed that the report is a consumer report and that the FCRA therefore applies to its use.[21]

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[19] ASC's February 29, 1996 supplemental memorandum, Exhibit 2, Aff. of Korotki at 140-141.

[20] As an attachment as Exhibit D to plaintiff's March 22, 1996 filing, plaintiff submitted an affidavit in support of plaintiff's position that the report at issue in this case is a consumer report. On March 29, 1996, defendants TRC and Schmitt moved to strike that affidavit. Plaintiff opposed that motion. Because this Court has resolved that issue without resort to the affidavit, the motion to strike that affidavit is moot.

[21] It may be possible to take the contrary position that the report is not governed by the FCRA because it was utilized for commercial purposes. Representative Sullivan, a sponsor of the FCRA, stated that the FCRA "does not apply to reports

B. Requirements of the FCRA

The legislative history of the FCRA indicates that Congress intended that statute "to protect consumers from inaccurate or arbitrary information in a consumer report, which is used as a factor in determining an individual's eligibility for credit, insurance or employment." 116 Cong. Rec. 36572 (1970). Representative Sullivan, one of the FCRA's sponsors, stated that the FCRA "permit[s] the free flow of information about a consumer, while providing the consumer at the same time the

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utilized for business, commercial, or professional purposes." 116 Cong. Rec. 36,572 (1972). Likewise, the Federal Trade Commission (FTC) has concluded that "the FCRA does not cover reports furnished for transactions that consumers enter into primarily in connection with businesses they operate (e.g. a consumer's rental of equipment for use in his retail store)." 16 C.F.R Part 600, at 387 (1995). That position however appears to conflict with the way some courts have defined a consumer report. *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273-75 (9th Cir. 1990) ("If a consumer reporting agency provides a report based on a reasonable expectation that the report will be put to a use permissible under the FCRA, then that report is a 'consumer report' under the FCRA" regardless of whether report is actually used for a business purpose) (emphasis in original); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 453 (7th Cir. 1988) ("even if a report is used or expected to be used for a non-consumer purpose, it may still fall within the definition of a consumer report if it contains information that was originally collected by a consumer reporting agency with the expectation that it would be used for a consumer purpose"); *Heath*, 618 F.2d at 696. Because this Court concludes that defendants used the report for a permissible purpose, and therefore did not violate the FCRA, this Court does not need further to explore that issue.

ability to rectify any errors causing his unwarranted difficulties." Id. Plaintiff apparently takes the position that the main purpose of the FCRA is to protect consumers' privacy. However, as Representative Sullivan noted, the House "amendments seeking to protect individual privacy were rejected" by Senate members of the Conference Committee. Id. While privacy is one of the concerns Congress was apparently considering when it enacted the FCRA, that concern was balanced by Congress against the needs of the business community for information regarding consumers. Such balancing of various concerns is evident from the statute itself which states that the purpose of the FCRA is

to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.

15 U.S.C. § 1681(b)

15 U.S.C. § 1681b allows a consumer reporting agency to furnish a consumer report, without the consumer's authorization, to a third party who has one of five purposes listed in § 1681b(3). That section provides in pertinent part that

[a] consumer reporting agency may furnish a consumer report . . . (3) to a person which it has reason to believe (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or . . . (E) otherwise has a legitimate business need for the

information in connection with a business transaction involving the consumer.

(emphasis added).

§ 1681b appears to impose requirements only on consumer reporting agencies. The parties in this case dispute whether ASC is a consumer reporting agency or a user of credit information.[22] That dispute does not require resolution, however, because the Fourth Circuit has concluded that users of consumer reports also must comply with § 1681b. *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 972 (4th Cir. 1987) (Kaufman, J., sitting by designation).

In *Hansen v. Morgan*, 582 F.2d 1214, 1216 (9th Cir. 1978), the Ninth Circuit incorporated the criminal provisions of section 1681q into sections 1681n [Civil liability for willful noncompliance] and 1681o [Civil liability for negligent noncompliance] and held that a user who obtains a consumer report under false pretenses, as those words are used in section 1681q, can be civilly liable under either section 1681n or 1681o. In Hansen, Judge Carter wrote that "the standard for determining when a consumer report has been obtained under false pretenses will usually be defined in relation to the permissible purposes of consumer reports which are enumerated in *15 U.S.C. § 1681b*," *id. at 1219* (footnote omitted), "that obtaining a consumer report . . . without disclosing the impermissible purpose for which the report is desired can constitute obtaining consumer information under false pretenses."

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[22] However, the parties agree that defendants TRC and Schmitt are users, not consumer reporting agencies.

827 F.2d at 971-72. Thus, whether defendants are users or consumer reporting agencies, they could only obtain Korotki's report if they had a permissible purpose. To prove a violation of the FCRA, plaintiff must show that defendants had an impermissible purpose in obtaining the credit report or, in other words, that they lacked a permissible purpose. The only purpose which the record reflects that defendants had was to obtain an alternate address at which to serve Korotki. In this Court's view, that purpose is permissible under *15 U.S.C. § 1681b*(3)(E); accordingly, defendants did not violate the FCRA.

One question which arises is the standard that a court should use to determine whether a user has shown that he or she has a permissible purpose under § 1681b. That provision requires that the consumer reporting agency have "reason to believe" that the information it provides to a user will be used for one of the enumerated permissible purposes. The case law suggests that the burden on users is similar. For example, in *Zeller v. Samia*, 758 F. Supp. 775, 781-82 (D. Mass. 1991), defendant had previously alleged that plaintiff owed him a debt and had obtained plaintiff's consumer report in connection with collection of that debt. The court concluded that that purpose in obtaining a consumer report was permissible, even though defendant merely had reason to believe plaintiff owed him a debt, and did not have conclusive proof of that fact. Likewise, in *Cambridge Title Co. v. Transamerica Title Insurance Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992), aff'd, 989 F.2d 491 (4th Cir. 1993), defendant, who was plaintiff's principal, believed that $1.3 million had been misappropriated and obtained plaintiff's consumer report to determine whether plaintiff had misappropriated that money. Judge Harvey concluded that such purpose was permissible even though defendant

apparently did not know, but only believed, that it could have been true that the money was missing. Thus, so long as a user has reason to believe that a permissible purpose exists, that user may obtain a consumer report without violating the FCRA.

C. Defendants' liability regarding the FCRA

§ 1681b(3)(E) authorizes a person to obtain a consumer's credit report when that person "has a legitimate business need for the information in connection with a business transaction involving the consumer." Courts have interpreted § 1681b(3)(E) in different ways. For example, the Third Circuit concluded that a transaction lies within the business need exception when it relates to "one of the other specifically enumerated transactions in §§ 1681a(d) and b(3), i.e., credit, insurance eligibility, employment, or licensing." *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986). See also *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991). Courts adopting such a restrictive approach reason that "a broad interpretation of the "business transaction" language of § 1681b(3)(E) would render the specificity of §§ 1681a(d) and b(3) meaningless." *Houghton*, 795 F.2d at 1149. Other courts have adopted a less restrictive interpretation of that section. *Hovater v. Equifax, Inc.*, 823 F.2d 413, 419 (11th Cir. 1987); *Cambridge*, 817 F. Supp. at 1278; *Houghton*, 795 F.2d at 1150 (Sloviter, J., concurring). See also Elwin Griffith, The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions, 25 U. Mem. L. Rev. 37, 51-62 (1994) (discussion of various interpretations of § 1681b(3)(E).

Even under the narrowest interpretation of § 1681b(3)(E), defendants in this case had a permissible purpose to obtain

Korotki's consumer report because the business transaction involved here related to § 1681b(3)(A), one of the other purposes specifically enumerated by § 1681b(3), which authorizes a person attempting to collect an account of a consumer to obtain the consumer's credit report. Angelozzi, and those working for him, apparently believed that the debt was owed by Korotki, the consumer,[23] or by APK Development.[24] Thus, § 1681b(3)(A) would appear to provide sufficient authority for defendants' actions. However, even if that not be so, the business transaction giving rise to

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[23] The FCRA defines a consumer merely as "an individual." § 1681a(c). The statute does not limit the definition of a consumer to consumer purposes. Elwin Griffith, The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions, 25 U. Mem. L. Rev. 37, 58 (1994). This definition is in contrast to Congress' explicit definition of a consumer in the Truth in Lending Act as a natural person involved in a credit transaction for personal, family or household purposes. *15 U.S.C. § 1602*(h). Under the FCRA's definition of a "consumer," this Court concludes that Korotki is a consumer, and entitled to assert what a "consumer" may assert under the FCRA.

[24] Schmitt testified that Angelozzi's contract was with APK Development and not with Korotki. TRC's and Schmitt's January 5, 1996 motion for summary judgment, Ex. 3, Dep. of Schmitt at 40. However, the record contains certain indications that Korotki, personally, may have been a party to the alleged contract. Id., at PP H, I. That may involve an issue of law, or of mixed law and fact, which has not been fully briefed by the parties. However, because this Court concludes that defendants, in any event, have a permissible purpose under § 1681b(3)(E), it is not necessary to resolve that issue.

the alleged debt involved Korotki, thus bringing the matter under and within § 1681b(3)(E).

In this case, Korotki testified that he asked Angelozzi to perform certain compaction services whether or not those services were already included in Angelozzi's contract with the County. Korotki further testified that he agreed, if the County was not obligated so to pay, to pay $12,000 in the form of a certain car in return for Angelozzi's performing those services. Korotki does not withdraw those statements but now claims that he has never had any "personal business relationship" with Angelozzi.[25] The parties apparently dispute whether, on those facts, a business relationship involving Angelozzi and Korotki existed. That dispute does not prevent the entry of summary judgment, however, because it is not a relevant dispute. This Court is not required in this case to determine whether such a business relationship in fact existed. Instead, this Court need only determine whether Angelozzi had reason to believe that such a relationship existed. See *Zeller v. Samia*, 758 F. Supp. 775, 781 (D. Mass. 1991). In that context, this Court concludes that the agreement between the two parties, to which plaintiff admits, gave Angelozzi reason to believe that Korotki and/or APK Development owed Angelozzi a debt. For that reason, Angelozzi was entitled to attempt to collect the debt and to hire Schmitt and TRC to do so. See *Baker v. Bronx-Westchester Investigations, Inc.*, 850 F. Supp. 260, 262-63 (S.D.N.Y. 1994) (private detective acting on behalf of judgment creditor was entitled to obtain judgment debtor's consumer report); 16 C.F.R. Pt. 600 App. at 392 ("An attorney collecting a debt for a creditor client, including a party suing on a debt or

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[25] Plaintiff's January 5, 1996 Supplemental Memorandum, Exhibit L, Aff. of Korotki at P16.

collecting on behalf of a judgment creditor or lien creditor, has a permissible purpose to obtain a consumer report on the debtor to the same extent as the client."). Moreover, it appears that Schmitt and TRC, in turn, were entitled to hire ASC to aid in the collection effort.

Plaintiff argues that ASC did not have a permissible purpose because ASC admitted that Schmitt never asked ASC to collect the debt, but only asked ASC to post a mechanic's lien and, later, to serve Korotki personally. In *Baker*, 850 F. Supp. 260 (S.D.N.Y. 1994), the plaintiff made a similar argument. That court stated:

For purposes of *15 U.S.C. § 1681b*, we find no material distinction between the hiring of an investigator to actually collect a judgment, and the hiring of an investigator to locate the debtor so that judgment may thereafter be collected. This is clear in light of the language of § 1681b that a report may be issued for the 'review or collection of an account.'

Id. at 262 n.5. Likewise, this Court finds no material distinction between the hiring of ASC to collect a debt and the hiring of ASC to establish a mechanic's lien or effect service so that the debt "may thereafter be collected." Id.

Plaintiff asserts that, if this Court grants summary judgment to defendants, such a ruling will allow any claimant asserting a monetary claim against another person to obtain that person's consumer report without violating the FCRA. Plaintiff's assertion is incorrect because asserting a monetary claim and collecting a debt present two different situations. For example, in *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), the plaintiff quit employment with the defendant and

established a competing firm. The defendant, in an earlier action, sued the plaintiff, alleging unfair competition. Before filing that suit, the defendant obtained the plaintiff's credit report in order to determine whether plaintiff had sufficient assets to pay the judgment demanded in defendant's complaint. When plaintiff learned of defendant's acquisition of the credit report, plaintiff sued defendant, alleging violations of the FCRA. The Ninth Circuit concluded that defendant violated the FCRA, in part because defendant was not involved in a credit transaction with the plaintiff and did not have a permissible purpose under the FCRA to obtain plaintiff's consumer report. *Id.. at 308.* Mone is distinguished, however, from the instant case in which it is undisputed that Korotki offered to pay Angelozzi for certain construction services. Furthermore, Angelozzi had at least some reason to believe Korotki and/or APK Development owed him a debt. Those facts indicate a credit transaction and are sufficient to create a permissible purpose under the FCRA.

Plaintiff also argues that, assuming defendant ASC only needed another address at which to serve plaintiff, ASC could have obtained that address by running a less intrusive credit check. ASC responds that the less intrusive reports would not have provided an additional address. Even assuming ASC could have obtained the information it needed from a less comprehensive summary, the FCRA does not limit authorized users' access to credit information. A user who has a permissible purpose may obtain a consumer report.[26] Plaintiff

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[26] The FCRA does limit use of an "investigative consumer report", defined in § 1681a(e) as a consumer report in which the information is obtained through personal interviews with the consumers' neighbors, friends or associates. See § 1681d "Disclosure of investigative consumer reports."

offers no authority for his contrary position that the FCRA requires a user to obtain the least intrusive report containing the information sought. Because this Court concludes that defendants had a permissible purpose, they did not violate the FCRA by ordering what plaintiff refers to as a full credit report.[27] That defendants may not have needed the credit information included in that report, but only an additional address at which to service Korotki, does not change that result.

Finally, plaintiff argues that once the period for establishing the mechanic's lien had expired, serving Korotki personally with papers regarding that lien would have no effect. Assuming without deciding that that proposition is accurate, it was nevertheless reasonable for Schmitt to pursue personal service if he believed at the time that such service would preserve rights of his client which would otherwise be lost. The record reflects that Schmitt did so believe.[28] The defendants, having produced evidence of a permissible purpose, are entitled to summary judgment unless plaintiff, who bears the burden of going forward to show lack of a proper purpose, produces some evidence upon which a jury could find to the contrary. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505

However, in any event, plaintiff does not assert in any of his pleadings that the report at issue in this case is an investigative consumer-report

[27] Plaintiff's November 22, 1995 cross-motion for summary judgment at 5.

[28] TRC's and Schmitt's January 5, 1996 motion for summary judgment, Ex. 3, Dep. of Schmitt at 27-37.

(1986). Plaintiff has not offered any bad faith reason for which Schmitt might have obtained the credit report. Plaintiff appeared merely to speculate during the December 29, 1995 hearing that Schmitt might be untruthful and that his credibility was an issue for the jury. Such a response is insufficient to survive summary judgment. *Smith v. First National Bank of Atlanta*, 837 F.2d 1575, 1580 (11th Cir. 1988) (summary judgment in favor of defendant appropriate in privacy claim arising from same facts as FCRA claim because plaintiff produced no evidence that defendant acted in bad faith) (decision of district court included as an appendix to 11th Circuit's opinion); *Zeller v. Samia*, 758 F. Supp. 775, 782 (D. Mass. 1991) (plaintiff who introduced no evidence indicating that defendant's use of consumer credit report was for any other reason than in connection with a business transaction with plaintiff did not survive summary judgment).[29] Furthermore, plaintiff cannot get to the jury

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[29] Cf. *Yohay*, 827 F.2d 967, 969, 972 (court concluded that ex-wife who testified that she obtained her ex-husband's credit report to ensure that he was no longer using joint credit arrangements obtained that report under false pretenses); *Hansen v. Morgan*, 582 F.2d 1214, 1216-17, 1221 (plaintiff who alleged that defendants obtained plaintiffs' credit report in order to determine whether one plaintiff used improper financing procedures during an election campaign survived summary judgment).

It may be that summary judgment is seldom appropriate when state of mind is at issue. *Magill v. Gulf and Western Industries, Inc.*, 736 F.2d 976, 979 (4th Cir. 1984) (record contained conflicting evidence regarding state of mind issue); *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979) (same). Defendants are nevertheless entitled to summary judgment in this case because plaintiff has neither

simply because he hopes that "the jury will disbelieve the evidence that the summary judgment movant has adduced." *Wilson v. Clancy*, 747 F. Supp. 1154, 1158 (D. Md. 1990). See also *DF Activities Corp. v. Brown*, 851 F.2d 920, 922 (1988) ("A plaintiff cannot withstand summary judgment by arguing that although in pretrial discovery he has gathered no evidence of the defendant's liability, his luck may improve at trial."). While it is true that credibility determinations are for the jury, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), plaintiff must "produce some fact to shake the credibility" of defendants' witnesses. *Schoonfield v. Mayor and City Council of Baltimore*, 399 F. Supp. 1068, 1078 (D. Md. 1975). Plaintiff has not done so here. For that reason, defendants are entitled to summary judgment.

Judge Harvey's decision in *Cambridge Title Co. v. Transamerica Title Ins. Co.*, 817 F. Supp. 1263, 1278 (D. Md. 1992), aff'd, 989 F.2d 491 (4th Cir. 1993), provides further support for this Court's conclusion that defendants in this case did not violate the FCRA. In Cambridge, plaintiffs were a title company and its principal officer, Henry Louis. Cambridge Title Company did not underwrite the risks insured by the policies it issued but contracted with defendant Transamerica Title Insurance Company for such underwriting. Cambridge eventually became Transamerica's agent. Plaintiff Louis alleged that Transamerica violated the FCRA and the CCRAA by obtaining two credit reports on Louis. Transamerica had obtained one report "pursuant to regular credit checks undertaken by Transamerica concerning a person like Louis who was the principal of one of

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produced nor proffered any evidence that Schmitt, or any other defendant, acted in bad faith.

Transamerica's agents." *Id.. at 1278.* The other report Transamerica obtained to determine whether Louis had converted $1.3 million that was believed to be missing from Cambridge's escrow accounts for his personal use. Judge Harvey concluded that both of Transamerica's purposes were legitimate business purposes within the meaning of § 1681b(3)(E).

Plaintiff attempts to distinguish Cambridge by noting that Judge Harvey relied on the fact that the parties in Cambridge had an existing business relationship. Plaintiff then argues that he and Angelozzi did not have a business relationship in October, 1993 when ASC obtained plaintiff's consumer report. According to plaintiff, if such a relationship existed at all, it ended on July 7, 1993 when Angelozzi completed its work at Old Court Village. However, a business relationship does not end when the work contracted for is completed, but only when both performance and payment are satisfactorily accomplished and completed. In effect, plaintiff is arguing that one party to a business relationship can terminate that relationship by refusing to pay an alleged debt. Clearly that is not the case.

D. State law statutory and common law counts

Because the FCRA and the CCRAA are virtually identical, this Court concludes that defendants violated neither statute. See *Cambridge*, 817 F. Supp. 1263, 1278 (D. Md. 1992). Regarding plaintiff's claim for invasion of privacy, this Court notes § 1681t which states:

This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the

collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provisions of this subchapter, and then only to the extent of the inconsistency.

The FCRA authorizes defendants' actions in this case. If Maryland tort law imposed such liability for those actions, that law would be inconsistent with the FCRA and, therefore, § 1681t would preempt that law.

Moreover, Maryland, in defining the torts relating to invasion of privacy, looks to the Restatement (Second) of Torts § 652B. *Lawrence v. A.S. Abell Co.*, 299 Md. 697, 700-701, 475 A.2d 448 (1984); *Hollander v. Lubow*, 277 Md. 47, 53-55, 351 A.2d 421 (1976), cert. denied, 426 U.S. 936, 49 L. Ed. 2d 388, 96 S. Ct. 2651 (1976); *New Summit Associates v. Nistle*, 73 Md. App. 351, 360, 533 A.2d 1350 (1987). According to the Restatement, a person who intentionally intrudes upon the private affairs of another is liable to the other "if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. Because Maryland law, specifically the CCRAA, authorizes intrusion upon plaintiff's affairs to the extent which occurred in this case, such intrusion, as a matter of law, is hardly highly offensive to a reasonable person.

Finally, because this Court concludes that none of the defendants are liable to plaintiff, defendant ASC's third party claims against Schmitt and TRC, and Schmitt and TRC's third party claims against ASC, are moot.

IV. Conclusion

For the reasons stated above, this Court will enter summary judgment in favor of all defendants on all of plaintiff's claims against them in a separate Order of even date herewith and, in that Order, deny, or treat as moot, all other pending motions.

Supreme Court, U.S.
FILED
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No. 97-1478

In The

Supreme Court of the United States

October Term, 1997

ABRAHAM PAUL KOROTKI,

Petitioner,

vs.

ATTORNEY SERVICES CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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STATEMENT PURSUANT TO RULE 29.6

Respondent Thomas, Ronald & Cooper, P.A., has no parent companies or nonwholly owned subsidiaries. Respondent Attorney Services Corporation has no parent companies or nonwholly owned subsidiaries.

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I

STATEMENT OF THE CASE

There is no cause for this Court's review of Petitioner's factual contentions, which have been rejected by the United States District Court for the District of Maryland in a comprehensive opinion and by the United States Court of Appeals for the Fourth Circuit.

The captioned appeal arises from the District Court's grant of summary judgment in favor of Defendants/Respondents Attorney Services Corporation ("ASC"), the law firm of Thomas, Ronald & Cooper, P.A. ("TRC"), and Daniel Schmitt, Esquire ("Schmitt"), an attorney at TRC (collectively, the "Defendants"), with respect to claims asserted by Plaintiff/Petitioner Abraham Paul Korotki ("Korotki") for alleged violation of the Fair Credit Reporting Act (the "FCRA") and the Maryland Consumer Credit Reporting Agencies Act (the "CCRAA") and alleged invasion of privacy. 15 U.S.C. § 1681, *et seq.*; Md. Comm. Law Code Ann. § 14-1201, *et seq.* The proceedings below commenced with the filing of Korotki's Complaint against ASC on May 9, 1994, wherein Korotki alleged that ASC obtained his "consumer credit report" without his permission and without a permissible purpose. J.A. 4, 18. Korotki sought damages of $275,000. J.A. 22-33. The District Court entered summary judgment based upon the undisputed evidence, stipulations of fact, extensive memoranda of facts and law submitted by all parties and proceedings on the record, including a lengthy hearing before the Honorable Frank A. Kaufman on December 29, 1995. The Fourth Circuit Court of Appeals affirmed the decision of the District Court on December 5, 1997.

At his deposition, Korotki testified that he entered into an oral contract with Angelozzi Brothers, Inc. ("Angelozzi"), a utility contracting company in Baltimore, for contracting work at Old Court Village ("OCV"). J.A. 497-498. OCV is a single

family housing subdivision located on land owned by Korotki and under development by Korotki and Korotki's company, APK Development Corp. ("APK"). J.A. 497-98. On or about October 17, 1991, Korotki entered into a Public Works Agreement ("PWA") with Baltimore County for the construction of public improvements at OCV. J.A. 495, 697-705. These improvements included the water and sewer mains, sanitary sewer connections, water services, storm water management facilities, roads and street lights. J.A. 698. In connection with the PWA, Korotki himself stated that he was acting both for his own personal benefit, and for the benefit of APK. J.A. 670-72, 697. Baltimore County bid the utility work required under the PWA and Angelozzi was awarded the contract as the low bidder. J.A. 495-96, 671, 811. Korotki agreed to pay the cost of Angelozzi's work under the PWA. J.A. 700.

The PWA called for Angelozzi to dig the utility trenches for the installation of the mains at OCV. J.A. 809, 1001. In a conversation on April 19, 1993, Korotki told Angelozzi (through its President, Frank Angelozzi) that Korotki wanted full compaction of the soil that was being used to refill in the utility trenches at OCV. J.A. 497. Angelozzi agreed to provide full trench compaction at OCV and quoted Korotki a cost estimate of $12,000. *Id.* Korotki testified under oath that his agreement with Angelozzi was "clear" that Korotki wanted Angelozzi to perform trench compaction at OCV "whether it was in the PWA or not." J.A. 498. Korotki agreed to pay Angelozzi $12,000 for compaction, separate and apart from the PWA, provided that Angelozzi was not required to provide trench compaction under the PWA. *Id.* Korotki offered to pay Angelozzi for the compaction work from his own personal assets by offering to give Angelozzi his 1976 Cadillac El Dorado, titled in his name, instead of cash. J.A. 498, 710-11, 817. Angelozzi claims to have performed trench compaction at OCV in full pursuant to his oral contract with Korotki. J.A. 812, 817.

Angelozzi completed the trench compaction at OCV for one-half of the original cost estimate and submitted an invoice to Korotki for $6,000. J.A. 715. Angelozzi made repeated demands for payment and even indicated that it would be forced to pursue a mechanic's lien if not paid. J.A. 817. Korotki refused to pay Angelozzi's invoice, claiming that Angelozzi did not perform the work and that compaction was required under the PWA, in any event. J.A. 499, 819. Before Angelozzi began the compaction work, however, Korotki, Frank Angelozzi and three Baltimore County Department of Public Works inspectors met at OCV and reviewed the matter. J.A. 817. The County inspectors concluded that Angelozzi was correct in asserting that it was not required to perform full trench compaction under the PWA. J.A. 818. Thus, a dispute arose between Korotki and Angelozzi: Angelozzi contended that full trench compaction was not required under the PWA; Korotki contended that trench compaction was required of Angelozzi under the PWA and that Angelozzi had failed to provide it. J.A. 499, 817.

On September 22, 1993, unable to obtain payment for its services as promised from Korotki, Angelozzi sought a mechanic's lien against OCV, Korotki's development property. J.A. 253, 391, 812. Angelozzi attempted to serve a notice of mechanic's lien on Korotki by certified mail, but the envelope was returned unclaimed. J.A. 559-60, 647. Angelozzi then turned the matter over to its regular attorneys, TRC and Schmitt, to pursue collection of the alleged debt. J.A. 253, 391. TRC and Schmitt confirmed that Korotki was the record owner of OCV and hired ASC to post the notice of the mechanic's lien at the development project. J.A. 551-555, 641-46. ASC had provided private process service for Schmitt and TRC for a number of years. J.A. 397.

Schmitt provided ASC with written instructions of how to post OCV, but when reviewing Schmitt's letter, ASC thought

the notice was to be posted at Korotki's residence. J.A. 110, 132, 641-46. On September 30, 1993, ASC tried unsuccessfully to personally serve the notice of mechanic's lien on Korotki at his house. J.A. 357, 374-75. ASC's process server claims to have spoken with Korotki and requested that he accept court documents, which Korotki refused. *Id.* The process server claims to have been cautioned by Korotki that she was trespassing and ordered off of the premises. *Id.* The process server's access to Korotki's house was barred by a locked iron gate that blocked the sole entrance to the house across a bridge. J.A. 357, 482, 730. "No Trespassing" and "Beware of Dog" signs were posted on the iron gate surrounding Korotki's house. J.A. 379. Unable to serve Korotki personally, the process server posted the notice on the iron gate surrounding Korotki's house. J.A. 357, 381, 727. Korotki later removed the envelope containing the notice of mechanic's lien and gave it to his attorney, apparently within 90 days after the completion of work by Angelozzi. J.A. 485-87.

When Schmitt learned that Korotki's residence had been posted rather than OCV, Schmitt directed ASC immediately to post the notice at OCV and obtain personal service of the notice on Korotki. J.A. 572. The statement in Korotki's Petition that Schmitt conceded that the time for serving the notice had long expired under Maryland law does not correctly reflect the record of the case. Petition, p. 6. Schmitt testified in deposition that he believed, based on Maryland law, that the Court would consider all efforts to serve notice on Korotki, including efforts undertaken more than 90 days after Angelozzi's completion of work at OCV based on the particular facts of this case. J.A. 573-75, 627-28. Schmitt referred Korotki's counsel to a Maryland Court of Special Appeals case that supported Schmitt's belief and produced a copy of the opinion from his file at his deposition. J.A. 627-28.

Similarly, the statement in Korotki's Petition implying that APK was the owner of record of OCV in 1993 does not correctly reflect the record of the case. Petition, p. 6. Korotki himself testified under oath in deposition that he owned OCV continuously, in fee, from 1976 to August 25, 1995, the date of his deposition. J.A. 436-37. In addition, Schmitt confirmed that Korotki was the owner of record of the real estate on which OCV is situated from several official sources, including the recorded property deed, the development plan for OCV on record with the County and the County tax rolls. J.A. 551-55. Further, the statement in Korotki's Petition that the evidence shows that there was never a need to serve Korotki does not correctly reflect the record nor Maryland law. Petition, p. 4. Korotki testified that he owned the OCV property. J.A. 436-37. Maryland law requires service of the notice of intent to lien on the property owner. Md. Rule Prop. Code Annot. § 9-104.

On October 8, 1993, after Schmitt advised ASC that the wrong property had been posted, ASC immediately posted the mechanic's lien notice at OCV and attempted personal service on Korotki at his residence. J.A. 357. As before, the process server could not gain access to Korotki's house, so she posted another copy of the notice on Korotki's gate. J.A. 378, 382. A few days later, ASC returned to Korotki's residence and left a note requesting that Korotki call ASC to arrange for delivery of a court document at his convenience. J.A. 358, 383. When ASC returned a few days later to re-attempt service, the note had been removed. J.A. 358. A similar note was left in its place by ASC. J.A. 358. Eventually, Korotki called ASC and was told that ASC had an important court document for him. J.A. 776. Korotki said he would make arrangements to pick it up, but he never did. *Id.*

ASC also attempted service at an office where Korotki previously had conducted his law practice, but found only a

building advertised for sale with no one present. J.A. 358. Korotki's house and office having proved impossible locations for personal service of the notice of mechanic's lien, ASC increased its efforts to serve Korotki at OCV. J.A. 378. Near around-the-clock efforts were undertaken by ASC to serve Korotki. J.A. 359, 377-78. Between October 30 and December 20, 1993, ASC made twenty-three separate attempts to serve Korotki. J.A. 59, 121, 377-78. All efforts were unsuccessful.

In October of 1993, ASC was running out of places to attempt service on Korotki. ASC asked Schmitt to review his file for an alternative address, but Schmitt's file reflected no further information. J.A. 732. ASC and/or Schmitt obtained Korotki's motor vehicle report, report of judgments, development plan for OCV and tax bill, but they contained no new information. J.A. 585, 597, 655-59, 743. Under the circumstances, ASC told Schmitt, "we have no place to go from here [to serve Korotki]," "we are . . . at ground zero." J.A. 742-43. Schmitt told ASC to obtain any available information that offered the slightest glimmer of hope of locating a serviceable address for Korotki. J.A. 732. On October 25, 1993, ASC obtained APK's corporate information report from the State Department and Korotki's credit report from Equifax Credit Information Services. J.A. 523 735-38, 825, 827. ASC is licensed by the State of Maryland as a collection agency and is permitted to access credit reports. J.A. 747. ASC recalls that Schmitt specifically requested that ASC obtain Korotki's credit report; Schmitt does not recall specifically one way or the other. J.A. 393, 732, 944.

ASC's purpose for accessing the reports was to obtain a new address to serve Korotki with the mechanic's lien notice since ASC's repeated service attempts had failed up to that point. J.A. 760. The statement repeated throughout Korotki's Petition, that ASC admitted that it did not need the credit report to locate

a service address for Korotki, does not correctly reflect the record of the case. The record is replete with evidence that ASC made multiple unsuccessful attempts at service at each address that ASC had for Korotki, but that Korotki's house was gated, his office was vacant, Korotki could not be located at OCV and he did not respond to requests to accept service. J.A. 356-86. ASC's inability to serve Korotki after multiple attempts is the basis for ASC's belief that it needed a serviceable address for Korotki. J.A. 738, 748. ASC had used credit reports to obtain alternative addresses for service of process in the past and, therefore, knew that such reports contained useful information in regard to service. J.A. 719-20, 735-37. The record reflects that ASC anticipated finding information in Korotki's credit report to assist with service, such as the name of a business where Korotki was an officer. J.A. 744. ASC would then check the telephone book for a business address at which to serve Korotki. J.A. 744. ASC even could have derived helpful information from an abbreviated business name. J.A. 744. If that information was not contained in the report, then ASC could contact companies listed in the credit report that recently inquired into Korotki's credit history and request an address from that source. J.A. 524-25, 744-45. One of ASC's employees is very familiar with whom to contact in that regard. *Id.*

ASC reviewed the addresses for Korotki contained in the corporate information report and credit report and ascertained that the reports contained no new addresses where service might be attempted. J.A. 742-44, 748. A few days later, ASC sent both reports to Schmitt by facsimile and made no further use of the reports and, in fact, destroyed them. J.A. 752, 944, 1207-10. Schmitt made no use of the credit report. J.A. 396. Neither party further disseminated the information contained in the report. J.A. 594, 511. Korotki's counsel admitted at the motions hearing in the trial court that he had "[n]o evidence on that point" to contradict the Defendants' assertion. J.A. 268.

Personal service on Korotki of the notice of mechanic's lien never was effectuated and on January 3 or 4, 1994, Schmitt advised ASC to discontinue its efforts to serve Korotki, which by then had become futile. J.A. 595-96. Unable to complete service of the mechanic's lien notice, Angelozzi filed a breach of contract action against APK in state district court to recover its $6,000 fee for trench compaction at OCV. (*Angelozzi Brothers, Inc. v. APK Development*, Circuit Court for Baltimore County, case no.: 94-CV-3226.) J.A. 712-14. Korotki, individually, and APK filed counter-claims against Angelozzi for alleged negligence, third-party beneficiary, breach of contract, and misrepresentation regarding the PWA and Angelozzi's alleged failure to provide trench compaction. J.A. 668-96. Korotki and APK sought over $2 million in damages from Angelozzi and transferred the case to the circuit court. *Id.* Korotki alleged in that case that he entered into the PWA "acting on his own behalf and on behalf of A.P.K. [Development]." J.A. 670. Korotki and APK also alleged claims against Baltimore County, various employees of the Department of Public Works of Baltimore County, other contractors at OCV and the bonding company for the PWA. J.A. 668-96. Korotki claimed that he personally, as well as APK, suffered millions of dollars in damages from Angelozzi's alleged negligence and breach of contract at OCV. *Id.*

The statements throughout Korotki's Petition that Angelozzi "failed to perform the required compaction," that "Angelozzi was already paid in full to perform this compaction," that Angelozzi "never established any collectible debt . . . ," and "frivolous claims by a contractor who has already been paid for work never performed" grossly misstate the record and are disingenuous, at best. Petition, pp. 6, 16, 20. *Angelozzi Brothers, Inc. v. APK Development* was tried for seven days in August of 1996 and the jury returned a verdict in favor of

Angelozzi on all claims and against Korotki and APK on all counter-claims.[1]

In November of 1993, while refinancing his residence, Korotki authorized the mortgage company to obtain his credit report and in that way learned of ASC's prior credit inquiry, which was indicated on the report. J.A. 472-73. Although Korotki initially testified in deposition that the mortgage company "demanded an explanation" of the ASC inquiry, Korotki later acknowledged that the mortgage broker was his son. J.A. 472-76. Korotki testified that he sustained no out-of-pocket damages from ASC's credit inquiry, save a few long distance phone calls. J.A. 440-42, 452-53. Korotki believed, however, that two credit card issuers turned down his applications due to the reference to ASC's inquiry on his credit report. J.A. 453. Korotki was not informed by the credit card companies of the reason for the rejection of his applications and obtained several credit cards a few months later. J.A. 449-51.

At the conclusion of discovery, ASC filed a motion for summary judgment. J.A. 48-71. Based upon Korotki's own sworn testimony evidencing the oral contract between Korotki and/or his company and Angelozzi, as well as other facts in the record, the District Court found that Angelozzi had reason to believe that a business relationship existed between Angelozzi and Korotki and/or APK. J.A. 1340, 1343. On the same bases, the District Court concluded that Angelozzi was entitled to attempt to collect the debt arising from Korotki's admitted refusal to pay the fee charged under the oral contract, and to retain counsel to assist Angelozzi with collection. J.A. 1343. Citing the statutory provision expressly authorizing the furnishing of a consumer report ". . . in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving . . . collection of an

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1. The verdict in *Angelozzi Brothers, Inc. v. APK Development* was not part of the record before the District Court on summary judgment, as the case was pending when the District Court ruled.

account of the consumer" (15 U.S.C. § 1681(b)), the District Court correctly ruled that ASC had a permissible purpose under the FCRA to obtain Korotki's credit report. J.A. 1338-39.

The statement in Korotki's Petition implying that the District Court entered summary judgment in spite of factual questions raised by the record does not correctly reflect the record of the case. Petition, p. 7. The Judge's statements were made within the first few moments of a motions hearing that lasted more than four hours, during which the Court painstakingly resolved each and every fact issue by party stipulation or by ordering the filing of various memoranda setting forth the evidence and discovery documents. J.A. 251-3, 263-64, 268, 291-96. Further, during the six months between the hearing and the entry of summary judgment in favor of the Defendants on June 12, 1996, the District Court provided all parties with numerous opportunities to supplement the factual record of the case. J.A. 344-51, 1332-33.

Korotki appealed the District Court's grant of summary judgment to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's holding that Korotki's credit report was obtained for a permissible purpose under the FCRA. The Court of Appeals affirmed the District Court's holding that Angelozzi's attempt to collect an account owed by the consumer under § 1681(b)(3)(A) was a permissible purpose for obtaining the report and that the Defendants' efforts to obtain an alternate address at which to serve Korotki was a "legitimate business need" for the information in connection with a business transaction involving Korotki. J.A. 1342-43. The Court of Appeals, like the District Court, noted that the facts admitted by Korotki established a business relationship between the parties which gave rise to the permissible purpose for obtaining his credit report. Petition, A-5.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE PETITIONER HAS MISREPRESENTED AN INCONSISTENCY WITH OTHER CIRCUITS, WHERE NONE EXISTS.

Korotki's contention that certiorari should be granted because the Fourth Circuit Court of Appeals "ignored the opinions of all other circuits" is plainly incorrect. Petition, p. 11. Both the District Court and the Court of Appeals examined and relied upon the decisions of numerous circuits, including those that the Petitioner relies upon, in determining that the Defendants were entitled to summary judgment in this case.

Korotki attempts to demonstrate that the Court of Appeals diverged from the opinions of the other Courts of Appeal in regard to two determinations that the Court made. First, Korotki alleges that the Court of Appeals reversed the burden under the FCRA by requiring consumers to prove a bad faith misuse of their credit report in order to recover damages under the FCRA. Second, Korotki alleges that the Court of Appeals diverged from the opinions of the other Courts of Appeals in adopting a broad reading of "a legitimate business need" for the procurement of consumer reports under § 1681b(3)(E) of the FCRA.

The Court of Appeals applied existing law regarding the FCRA, as interpreted by other Circuits, in determining that Korotki's consumer report was obtained for a permissible purpose. The District Court did not reverse the burden of proof regarding permissible purposes for which a credit report may be obtained, as discussed below in Section III (A). The District Court properly applied the rule that the plaintiff bears the burden

of proof to the FCRA. Korotki made his "reversal of burden" argument at the District Court level and the Court of Appeals level, with no success. Without citing any law for his contention that the Defendants bear the burden of proving a permissible purpose, Korotki now asserts that the courts below improperly shifted the burden. This unsupported assertion does not give rise to a compelling reason for granting a Writ of Certiorari in this case.

Korotki's second alleged inconsistency with other Circuits relates to the definition of a "legitimate business need" under § 1681b(3)(E) of the FCRA. Section 1681b(3)(E) authorizes a person to obtain a consumer's credit report when that person "has a legitimate business need for the information in connection with a business transaction involving the consumer." As noted in the District Court's opinion, courts have interpreted § 1681b(3)(E) in different ways. Some courts have adopted a restrictive approach, concluding that the business need exception is satisfied when it relates to one of the other specifically enumerated transactions in §§ 1681b(3)(A)-(D). J.A. 1341-42. Other courts have adopted a less restrictive interpretation of that section, concluding that the business need exception is a basis distinct from the enumerated transactions. *Id.*

Korotki argues that the Circuit Court applied a broad interpretation of § 1681b(3), contrary to the rulings of the other Circuits. Despite Korotki's assertions, neither the District Court or the Court of Appeals adopted the broad interpretation of legitimate business need. The courts below found it unnecessary to address the Fourth Circuit's interpretation of § 1681b(3)(E) because it was irrelevant to the decision in this case. As stated in the District Court's Opinion,

> *even under the narrowest interpretation of § 1681b(3)(E), Defendants in this case had a*

> *permissible purpose to obtain Korotki's consumer report because the business transaction involved here related to § 1681b(3)(A), one of the other purposes specifically enumerated by § 1681b(3), which authorizes a person attempting to collect an account of a consumer to obtain the consumer's credit report.*

J.A. 1342 (emphasis added). The Court of Appeals affirmed that Angelozzi, through his attorney, was seeking to collect an account owed by Korotki, which is a permissible purpose.

The courts below relied on the decisions of other circuits in their determination that a permissible purpose for obtaining Korotki's credit report existed. The result in the case below is not in conflict with the decisions of other circuits; therefore, this Court should deny the Petition for Writ of Certiorari.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE PETITIONER HAS MERELY ASSERTED THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE PROPER RULE OF LAW.

Korotki's true disagreement with the decisions of the District Court and the Court of Appeals lies not in the interpretation of § 1681b(3)(E), but in the application of the statutory language to the facts that Korotki himself admitted. Rule 10 of the Supreme Court Rules specifically states that "a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Although characterized as an inconsistency among the circuits, the crux of Korotki's argument is that the courts below misapplied the law to the facts. Korotki

repeats throughout the Petition his insistence that there was no business relationship, credit transaction or debt between Korotki and Angelozzi, and no need for Defendants to obtain his credit report.

Korotki's own testimony proves his and APK's business relationship with Angelozzi. A party to a credit transaction has a permissible purpose to obtain the other party's credit report. In *Zeller v. Samia*, 758 F. Supp. 775 (D. Mass. 1991), the parties purchased a beach cottage, at which time plaintiff Zeller gave defendant Samia a promissory note for the down payment. Ten years later, Samia filed an action to partition the property, the parties' relationship having soured. When Samia re-discovered the old, allegedly unpaid note, he demanded payment. Zeller failed to pay and Samia reported a charge-off to the credit bureau. *Id.* at 777. Samia made several credit bureau inquiries, in response to which he received Zeller's credit report. *Id.* Zeller claimed that Samia used the report against him in the partition action. *Id.* The Court held that Samia's use of Zeller's credit report "to further assist him in the *collection of the alleged debt owed by the plaintiff*" was permissible under FCRA § 1681b(3)(A). *Id.* at 781 (emphasis added).

The collection of the alleged debt owed by Korotki to Angelozzi arising out of the business relationship between Angelozzi and Korotki and/or APK is based on Korotki's own undisputed testimony. Korotki testified in deposition that on April 19, 1993, he told Angelozzi to perform full trench compaction at his development project, OCV. J.A. 497. Korotki explicitly agreed with Angelozzi that Angelozzi was to perform trench compaction at OCV whether or not it was called for in the PWA. J.A. 497-98. Korotki testified that Angelozzi quoted him a price of $12,000 for the trench compaction, and Korotki agreed to pay Angelozzi, provided that Angelozzi was not required to provide trench compaction under an agreement that

Korotki had with the County, the PWA. *Id.* Korotki testified that he offered to pay Angelozzi for the compaction from his own personal assets by offering to give Angelozzi his 1976 Cadillac El Dorado, titled in his name, instead of cash. J.A. 498, 710-11, 817.

Angelozzi claimed to have performed the trench compaction and sent an invoice demanding payment for its services. J.A. 816. Korotki stated, and it is undisputed, that he refused Angelozzi's demands for payment. J.A. 819. Based on this testimony, and applying the reasoning of *Zeller v. Samia, supra*, the Defendants had a permissible purpose to obtain Korotki's credit report to collect Korotki's "alleged debt" to Angelozzi.

Korotki's argument below, that Angelozzi had no "existing business relationship" with him nor APK after July 9, 1993, is nonsense. Korotki's Brief, p. 29. July 9, 1993, is the date on which Angelozzi completed the trench compaction at OCV. J.A. 648. Korotki's theory is that his business relationship with Angelozzi ended when Angelozzi completed work on Korotki's project and Korotki decided not to pay him. J.A. 318-20, 1006. Korotki's counsel admitted in argument on the Defendants' motion for summary judgment that there had been a contract and that there was a claim, but argued that contract was "performed or breached" prior to the credit inquiry. *Id.* According to Korotki, the uncured breach of contract terminated the business relationship with Angelozzi. *Id.*

A contract is a set of promises, in this case, to perform construction services and to pay. *Kiley v. First National Bank of Md.*, 102 Md. App. 317, 333, 649 A.2d 1145, 1152 (1994). The business relationship that arises out of a contract does not summarily end when one party decides to not to pay the other. A contractual duty is discharged by nothing less than full performance. Restatement (Second) of Contracts, § 235.

Maryland courts often rely on the Restatement (Second) of Contracts. *See Pyles v. Goeller*, 109 Md. App. 71, 674 A.2d 35 (1969). Once a contract has been fully performed by one party, it cannot be terminated by the other party. *Maryland Law Encyclopedia*, Vol. 5A, Ch. 9, § 252. Yet that is precisely what Korotki argued in this case: that as soon as Angelozzi completed its work at OCV, the business relationship was over. J.A. 318-20. The District Court correctly rejected this incorrect statement of Maryland law and entered summary judgment for the Defendants based on the undisputed evidence of a credit transaction between Korotki and/or APK and Angelozzi. J.A. 1343.

The District Court applied the proper rule of law to the facts of this case, holding that even under a restrictive interpretation of § 1681b(3), the Defendants had a permissible purpose for obtaining Korotki's credit report because the Defendants were attempting to collect an account. J.A. 1342. The District Court's decision was based upon the evidence put forward in the case — primarily Korotki's own testimony regarding the transaction with Angelozzi. The District Court stated that

> it is undisputed that Korotki offered to pay Angelozzi for certain construction services. Furthermore, Angelozzi had at least some reason to believe Korotki and/or APK owed him a debt. Those facts indicate a credit transaction and are sufficient to create a permissible purpose under the FCRA.

J.A. 1345. The Court of Appeals noted that "[o]bviously, these admitted facts created a business relationship between the parties, and Angelozzi correctly believed this to be true." Petition, A-5. Korotki disagrees with the District Court's reliance on his own testimony; however, Korotki himself has articulated that a credit

report may be obtained for purposes of collection of an account of a customer. Petition, p. 10.

Since Korotki's arguments are based on an alleged misapplication of the law to the facts, he has failed to assert a compelling reason for this Court to grant certiorari and his request for a Writ of Certiorari should be denied.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW WAS A PLAINLY CORRECT APPLICATION OF THE FCRA AND APPLICABLE LAW REGARDING PERMISSIBLE PURPOSES FOR WHICH A CREDIT REPORT MAY BE OBTAINED.

A. The Courts Below Correctly Concluded That Plaintiff Has The Burden Of Proof.

Korotki's statement that the District Court "reversed" the burden of proof is wrong. Petition, p. 7. The District Court correctly ruled that Korotki had the burden of proving the elements of his claims, including that the Defendants obtained his credit report for an impermissible purpose. J.A. 306. The general rule is that the plaintiff has the burden of proof and thus bears the risk of non-persuasion, absent an express provision in the substantive law creating a legal presumption in favor of the plaintiff. *Sergeant Co. v. Pickett*, 285 Md. 186, 203, 401 A.2d 651, 660 (1979); *Crowther v. Hirschman*, 174 Md. 100, 109, 197 A. 868, 872 (1938). This is similarly the case under the FCRA.

> Although we are aware of no case directly addressing who has the burden of proving reasonableness of procedures, courts have generally assumed that burden falls on the plaintiff.

Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51, n.5 (D.C. Cir. 1984) (citations omitted). *See also Roseman v. Retail Credit Co., Inc.*, 428 F. Supp. 643, 646 (E.D. Pa. 1977) (the plaintiff has the burden of proving the defendant violated the FCRA).

This issue was addressed in *Stewart v. Credit Bureau, Inc., supra.* The case involved a plaintiff's claim of injury as a result of admittedly inaccurate information in his credit report allegedly due to the reporting agency's failure to follow reasonable procedures under the FCRA (15 U.S.C. § 1681e). The Court held:

> [A] plaintiff cannot rest on a showing of mere inaccuracy, shifting to the defendant the burden of proof on the reasonableness of the procedures for ensuring accuracy. There is no indication that Congress meant to so shift the nominal plaintiff's burden of proof as to requisite components of a claim based on statutory violation.

Id. at 47. Clearly, if Congress had intended to shift the burden of proof to the defendant, it could have done so.

> Congress demonstrated that it "knew how" to shift the burden from the plaintiff to the defendant by explicitly doing so in two other sections of the FCRA. See 15 U.S.C. §§1681d(c), m(c).

Stewart v. Credit Bureau, Inc., 734 F.2d at 51 n.5. In the FCRA provisions of 15 U.S.C. §§ 1681d(c), m(c), Congress demonstrated its intent to shift the burden of proof on an issue to the defendant, with clear, explicit language, as follows:

> No person may be held liable for any violation of subsection (a) of (b) of this section if he shows by a

> preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section. 15 U.S.C. §1681d(c)
>
> No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with the provisions of subsection (a) and (b) of this section. 15 U.S.C. §1681m(c).

Section 1681b(3), which Korotki argues reverses the burden of proof, does not contain any provision even remotely similar to the provisions contained in the above statutory sections wherein Congress unambiguously shifted the burden of proof to the defendant. J.A. 311-12, Petition, p. 7. Instead, § 1681b(3) states:

> Permissible purposes of consumer reports — A consumer reporting agency may furnish a consumer report under the following circumstances and no other . . .

Nowhere in this provision does Congress state an intent to shift the burden of proof to the defendant, based on a plain reading of the statute.[2] Accordingly, the burden of proof remains on

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2. Likewise, the statutory sections that impose liability for a violation of the FCRA contain no such language:

> Civil Liability for Negligent Non-Compliance — Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to the sum of. . . .

(Cont'd)

Korotki, who must present evidence from which the trier of fact can infer that the defendant violated the FCRA provisions on which his claim is predicated. *Stewart v. Credit Bureau, Inc.*, 734 F.2d at 51. Korotki's failure to establish that the Defendants obtained his credit report for an improper purpose under the FCRA, an essential element of his case on which he bears the burden of proof at trial, renders all other alleged facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. at 322-23. Consequently, the courts below correctly concluded that the Defendants were entitled to judgment as a matter of law. *Id.*

B. Defendants Met The Requirements Of The Fair Credit Reporting Act.

The FCRA was reviewed by the Fourth Circuit Court of Appeals in *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967 (4th Cir. 1987). In that case, Patricia Ryan obtained the credit report of her ex-husband to compare the list of his current credit card account numbers with the credit card account numbers that she and her ex-husband previously had established during their marriage. *Id.* at 972. Ryan did not disclose this purpose to the credit bureau. *Id.* The District Court held that Ryan had obtained Yohay's credit report for a purpose not permitted by the FCRA. *Id.* at 969. The Court of Appeals reviewed the relevant provisions of the FCRA and agreed that Ryan obtained the credit report under false pretenses. *Id.* at

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(Cont'd)

> Civil Liability for Willful Non-Compliance — Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to the sum of . . .

15 U.S.C. § 1681n, o.

972. In so ruling, the Court adopted the reasoning of *Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978):

> [t]he standard for determining when a consumer report has been obtained under false pretenses will usually be defined in relation to the permissible purposes of consumer report which are enumerated in 15 U.S.C. § 1681b, . . .

Yohay, 827 F.2d at 971-72. Thus, Korotki must prove that the Defendants had an impermissible purpose to obtain his credit report under the language of 15 U.S.C. § 1681b.

Korotki argues that the Defendants had an impermissible purpose because he contends that the Defendants did not need Korotki's credit history. Petition, pp. 3-21. No facts are offered in support of his oft repeated argument. The record shows clearly that ASC intended to use the information that it expected to be contained in Korotki's credit report to locate a serviceable address. J.A. 744. The need for this information arose from ASC's multiple unsuccessful attempts to serve Korotki at three locations. J.A. 356-59, 760. ASC expected that the credit report would contain helpful information regarding service based on ASC's familiarity with the contents of credit reports and ASC's past successes locating a serviceable address from information contained in credit reports. J.A. 719-20, 735-37.

Korotki alleges that the District Court's ruling allows anyone asserting a monetary claim to obtain a consumer's credit report. Petition, p. 18. The District Court considered and rejected that characterization, pointing out that "asserting a monetary claim and collecting a debt are two different situations." J.A. 1344. Korotki relies on *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), in an attempt to show that the Defendants violated the FCRA. Petition, p. 19. However, the District Court stated

that *Mone* was distinguishable because it was based in part on a determination that *no* credit transaction took place, whereas in this case the District Court held that the "facts indicate a credit transaction." J.A. 1345.

The fact that, upon reviewing the credit report, ASC determined that it contained no useful information is irrelevant. Korotki's theory that a user only has a permissible purpose under the FCRA if, after he receives and reviews the report, it is determined that the report contains the specific permissible information that the user needed. This interpretation is flawed for several reasons. First, if the determination of a permissible purpose only can be made in hindsight, the user cannot refrain from obtaining a credit report for an improper purpose. Second, the determination of whether the user has a permissible purpose would be based entirely on matters outside of the user's control, namely, what information the credit reporting agency included in the report. If Korotki's statutory interpretation were applied, liability would hinge on irrelevant facts, in this case whether the information in Korotki's credit report actually assisted ASC to locate a serviceable address for Korotki.

There is no legal authority cited in support of Korotki's argument that, prior to obtaining Korotki's credit report, the Defendants were required to obtain report containing different or less information.[3] Petition, p. 15. No such authority exists. Where a permissible purpose is present, the FCRA authorizes the furnishing of a credit report without any further qualification. 15 U.S.C. § 1681b. Korotki is thus challenging settled law and sound application, and his effort to do so does not call for this Court's review.

3. Although there is no duty to do so, the record reflects that the Defendants obtained and reviewed various other report on Korotki, trying to locate a serviceable address, including a motor vehicle report, a judgment report, tax records and land records. J.A. 394-95, 585, 655-59.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court deny Korotki's Petition for Writ of Certiorari in this case.

Respectfully submitted,

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